U.S. Department of Labor

Office of Administrative Law Judges
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Date Issued: January 29, 2001

Case No.: 2000-LHC-1090

OWCP No.: 01-145904

In the Matter of:

LLOYD A. PARKER,
Claimant

against

BATH IRON WORKS,
Employer

APPEARANCES:

JAMES W. CASE, ESQ.,
On behalf of the Claimant

STEPHEN HESSERT, ESQ.,
On behalf of Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by LLOYD A. PARKER ("Claimant") against BATH IRON WORKS ("Employer") for injuries allegedly sustained during the construction of various vessels.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held September 11, 2000 in Portland, Maine.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):[1]

1. An Employer/Employee relationship existed at the time of the injury between the Claimant and the Respondent;

2. Notice of the alleged injury was timely given;

3. Notice of Controversion was timely filed;

4. An informal conference was held December 2, 1999;

5. The Average Weekly Wage at the time of the alleged injury was $948.13.

ISSUES

The parties listed the following issues as disputed on the joint stipulation:

1. Causation of the Claimant's knee injuries;

2. Nature and extent of disability.

SUMMARY OF FACTS

I. Claimant's Employment

Claimant, Lloyd Parker, is a sixty-four year old gentleman. (TX, p. 17). From 1982 until 1999 he worked at the Bath Ironworks in Maine as a fire guard or fire inspector. (TX, p. 18). His duties

[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

included patrolling the ships in the yard for safety and security breeches. (TX, p. 19). During an eight hour shift, Claimant was required to patrol the ship he was assigned to four times. In the course of a patrol he had to visit thirty-six detex stations and clock in to indicate that he had made his rounds. The dimensions of the ship were approximately 600 feet long and eleven decks high. No compartment could be reached from an adjoining compartment, so Claimant had to climb and descend both vertical and inclined ladders in order to navigate through the entire vessel. (TX, p. 19, 20). The decks and ladders of the ship of course were made of steel. Frequently the Claimant's replacement would not report for work at the end of his shift. On those occasions, Claimant was forced to work overtime, meaning that he had to work an additional full shift. (TX, p. 21.)

Shortly after the one year anniversary of his service with Employer, Claimant was transferred from their Bath facility to the yard in Portland. At Portland, Claimant served as a fire inspector. This meant that he was responsible for fire watch duties not only aboard the ships that were in the yard, but also on the floating dry docks where the ships were housed. (TX, p. 22). Despite requiring less overtime, the work in the Portland yard during a normal shift was more intense. Claimant was required to inspect two ships, as well as the yard and an eighty five foot high dry dock. Getting to the top of the dry dock required climbing eighty five feet of inclined ladder. Once he was on top of the dock, Claimant then had to climb down nine sections of vertical ladder in order to inspect areas at the bottom of the dock. Additionally, Claimant was routinely required to place, exchange, and replace fire extinguishers throughout the ship and the dock. Each vessel had approximately 80 or 90 extinguishers which weighed about 50 pounds each. (TX, p. 24). The dry dock itself had more than 100 extinguishers. Claimant was responsible for the monthly servicing of all of these units. His job required constant walking on steel plates an vertical and inclined ladders. (TX, p. 24, 25).

Prior to hiring on with Employer, Claimant worked as a fire fighter for the city of Portland's fire department. (TX, p. 18). Claimant had worked in this capacity for 22 years. During that time he reports that he had never had a knee problem. (TX, p. 22). Claimant retired from the fire department in 1982. At that time he had reached the rank of Captain. (TX, p. 39). As a Captain, Claimant had been responsible for supervising a crew of 12 fire fighters. (TX, p. 40).

II. Onset of Claimant's Injury

Claimant testified that his knees began to hurt at the end of 1998. He stated that about that time he had a period where he was working 14 hour shifts seven days a week for about one month. Subsequently, during the 1998 Christmas shutdown, Claimant testified that he worked 17 days without a day off. (TX, p. 33). During the period, Claimant testified that he began to experience stiffness in his knees and that they ached. Claimant testified that when his knees went out he could not walk any further. He testified that when he went to first aide and told them about the problem they checked his knees and called the condition "fire-guard knees." (TX, p. 34). Claimant testified that his knee problems gradually became worse. He testified that they were stiff and he couldn't walk. He was even on crutches for a period of time. (TX, p. 36). Claimant testified that he left the employ of Bath Ironworks on January 7, 1999. By

that time, his knees hurt so much that he was having trouble getting in and out of his car. (TX, p. 36).

III. Medical Treatment

Treating Physicians

When Claimant's knees began to hurt, he sought the assistance of his family physician, Dr. Hunt. He testified that Dr. Hunt eventually arranged for him to be seen by a specialist, Dr. Miller. (TX, p. 37). When he saw Dr. Hunt on January 7, 1999, Claimant complained of sore, stiff knees that were aggravated by prolonged sitting. He also had bilateral hip pain. Dr. Hunt's medical records, however, reflect that the Claimant was able to ambulate normally. (CX-2, p. 3). Unfortunately the notes from the rest of that visit with Dr. Hunt are illegible.

On January 12, 1999, Claimant returned to Dr. Hunt again complaining of leg pain. According to the office notes he presented with papers for the doctor to fill out for worker's compensation. (CX-2, p. 3).

By March of 1999, when Claimant next visited Dr. Hunt for a follow-up the notes indicate that he was feeling much better and that his knees had felt more mobile in the last few days. (CX-2, p. 4). The Claimant was still experiencing stiffness with prolonged sitting, however. (CX-2, p. 4). At the end of this visit, Dr. Hunt prescribed several drugs for the Claimant to help deal with his medical problems. The list included Dellasone, Ultram, Sinemet, and Ambien among others. (CX-2, p. 4).

On April 27, 1999, Claimant returned to Dr. Hunt for another follow-up appointment. Dr. Hunt's notes reflect that the Claimant was having continuing pain and stiffness in his legs and that his knees became weaker with use. (CX-2, p. 4). On physical examination, Dr. Hunt determined that the Claimant's knees had a good range of motion. Dr. Hunt also determined that the Claimant was experiencing some 1/1 right left rigidity. (CX-2, p. 4). He continued the Claimant on his current medications. (CX-2, p. 4).

Included in the medical records from Dr. Hunt is a prescription sheet dated January 7, 1999. It indicates that the Claimant should work only single shifts, and not double shifts, while he is under the doctor's care. (CX-2, p. 5). Also included in the records is an initial practitioner report for the State of Maine Worker's Compensation Board. That document lists the diagnosis of the Claimant's problem as "acute exacerbation of chronic DJD knees." (CX-2, p. 6). The form also indicates that in Dr. Hunt's opinion the Claimant's condition was work related. (CX-2, p. 6). A subsequent report, dated January 25, 1999 indicates that the Claimant's diagnosis was confirmed by X-rays of the knee and that the Claimant's injuries were certainly work related. This progress report estimated that the Claimant would be able to return to work by March 1, 1999. (CX-2, p. 7). The records also include several subsequent

letters to Bath Ironworks regarding their IME performed by Dr. Herzog. These letters indicate that the Claimant should not return to work even with the restrictions proposed by Herzog. (CX-2, p. 9, 15).

In addition to Dr. Hunt's records, Claimant presents a radiology report from the Maine Medical Center. This report, dated January 8, 1999, reveals that the Claimant was suffering from advanced osteoarthritis involving both patellofemoral compartments. (CX-4, p. 1). As a result of this evaluation, Claimant was referred to Dr. Marc Miller of Rheumatology Associates. Doctor Miller examined the Claimant in March of 1999 and determined that the Claimant was suffering from inflammatory arthritis superimposed over his degenerative arthritis in both knees. Miller agreed that the inflammatory arthritis and the Claimant's recent diagnosis of Parkinson's Disease both disabled him from his fire guard position with the Employer. (CX-7, p. 1-3).

Doctor Miller saw the Claimant for a follow-up appointment at the end of March, 1999. On that visit he discovered that the Claimant was feeling much better with the use of Prednisone and that in general he was more comfortable and able to be a bit more active. He told the Claimant to continue on the Prednisone and to return for a follow-up in two months. (CX-7, p. 4). The Claimant returned in June of 1999. At that time he indicated that he was generally improved but still complaining of discomfort or weakness in his knees with prolonged standing or walking. Dr. Miller diagnosed sero-negative RA and began the Claimant on a course of disease altering medications along with continued use of Prednisone. (CX-7, p. 5).

When Claimant first began using the disease altering drugs, the Plaquenil caused him to have a severe rash. He was ordered to discontinue the medication for several days and then told to gradually restart the course of treatment. The change in the dosage of medication apparently kept the Claimant from having a negative reaction to it. By September of 1999 Dr. Miller noted that he was doing better and tolerating the medication well. (CX-7, p. 6). Over the course of the next two months, Claimant began to felt better with the Plaquenil treatment and was gradually weaned off of the prescription for Prednisone. (CX-7, p. 8). In May of 2000, however, the Claimant had an RA flare caused by a failure of the Plaquenil. He experienced increased stiffness in his knees and swelling. Doctor Miller switched the Claimant to Methotrexate and folic acid. (CX-7, p. 9). There are no further records from Dr. Miller.

During the course of his treatment for his workplace injury, the Claimant was also diagnosed with Parkinson's disease. He saw Dr. Kolkin at Maine Neurology for an evaluation. Dr. Kolkin ordered the Claimant to take Sinemet to attempt to control the condition and also scheduled a variety of lab tests to determine the nature of his condition. (CX-5, p. 1-2). On his return visit in February of 1999, Kolkin indicated that the Claimant's Parkinson's was moderately improved. (CX-5, p. 3). By March 26, 1999, Claimant's Parkinson's was listed as improved and adequately controlled for now. (CX-5, p. 3). Claimant's condition apparently fluctuated somewhat. In May of 2000, his Parkinson's was listed as being a little worse. (CX-5, p. 4). It appears based on the medical records that the Claimant's Parkinson's is unrelated to his knee problems, although it may contribute in part to his inability to return to work.

IME

The final doctor to examine Claimant with respect to his disability was Dr. Herzog, the Employer's IME. Herzog is a doctor of Osteopathy. He saw the Claimant but once for evaluation of his condition. As a result of his examination, Herzog agreed that the Claimant suffered from DJD of the knees bilaterally. (EX-14, p. 2). Herzog disagreed, however, that the Claimant's symptoms were related to any on the job injury. Instead, Dr. Herzog opined that walking on stairs or hard steel plates was a function of daily living. He stated that he thought the Claimant could return to his prior work with the modifications that the Claimant be allowed to sit for half the day and that he be afforded walking aids. He also suggested that the Claimant would temporarily be limited to light to moderate work and only half a day of weight bearing until his knees were replaced. (EX-14, p. 3).

Importantly, in his deposition, Dr. Herzog testified that the Claimant was now at a point where without knee replacement surgery his condition was stable in the sense that its indefinite lasting duration was unlikely to change significantly. (Depo. of Herzog at 15). He also testified that without surgery he would estimate the Claimant to have a 40% impairment of both lower extremities, which translates into approximately a 25% whole body impairment. (Depo. of Herzog at 16). In fact, Herzog admitted that carrying a lot of weight, climbing 11 flights of stairs multiple times a day, and walking and climbing throughout a 17 hour workday on a regular basis was not the kind of stress that most people would experience in every day life. Dr. Herzog agreed that more climbing and activity of this kind would put more stress on the knee joints. (Depo. of Herzog at 18). Upon further questioning, Herzog admitted that he had not considered the full scope of the Claimant's job in making his determinations about returning the Claimant to work. He agreed that the Claimant's duties were certainly more than one would expect in ordinary home life. (Depo. of Herzog at 21). Herzog concedes that this type of activity would certainly accelerate the deterioration of the Claimant's knees and the development of his condition. (Depo. of Herzog at 21).

Finally, throughout his testimony, Dr. Herzog suggested that the best position for the Claimant, given his condition, was one where he could sit for at least half of the day. (Depo. of Herzog at 11-14). Such positions included being a chauffeur, working at a gas station, security positions, and others. (Depo. of Herzog at 11-14).

DISCUSSION

I. Jurisdiction

The parties in this dispute do not contest that this Court has jurisdiction. Claimant was either

aboard a ship or a dry dock or in the Employer's shipyard at the time of his injury. The Court finds that the Claimant was an employee within the meaning of section 902 (3) of the Act. Finally we find that the Claimant was employed in a maritime location (a shipyard and dry dock) with respect to section 903(a) of the Act. *See* 33 U.S.C. § 902, 903.

II. Claimant's Prima Facie Case

To receive compensation under the Act, the Claimant must make out a prima facie case that he was injured within the course and scope of his employment and that this injury has resulted in a disability. In order to make out the prima facie case, the Claimant must demonstrate that he suffered some harm or pain. *See Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir 1979). The Claimant must also demonstrate that an accident occurred or working conditions existed which could have caused the pain or harm. *See Kelaita v. Triple A. Mach. Shop*, 13 BRBS 386 (1981).

The case before the court presents ample evidence that the Claimant suffered a painful and long lasting injury. Further, the Court is persuaded by the opinion of the treating physicians that the Claimant's injury was caused directly by his employment with the Employer. The Court finds that the Claimant has presented sufficient evidence to invoke the Section 20(a) presumption that his injuries are compensable.

Specifically, the Court considers the following facts from the record. First, Claimant worked for 22 years as a fire fighter without experiencing any significant knee problems. (TX, p. 18, 22). Second, Claimant's employment with Employer required him to engage in strenuous physical activity including walking on steel plate decking and climbing a variety of different types of ladders and carrying heavy fire extinguishers in the normal course of his employment. (TX, p. 19-20, 24, 25). Third, the medical evidence, including the testimony of Employer's independent medical examiner, indicates that this type of activity could, and in this case probably did, accelerate the Claimant's knee problems. (CX-2, p. 6; Depo. of Herzog at 18, 21). The Court finds that this evidence is more than sufficient to support the Claim that the Claimant suffered harm or pain and that work conditions existed which caused that harm or pain. Based upon this finding, the Court concludes that the Claimant is entitled to the presumption of Section 20(a) of the Act. *33 U.S.C. § 920(a)*.

Once the Claimant has met his burden and the presumption is invoked, it is Employer's burden to go forward with substantial evidence that the injury did not arise out of the Claimant's employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475, (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Most often this evidence is presented in the form of independent medical examiners who offer reasons to disbelieve the causal connection between the Claimant's injuries and his occupation.

Employer, Bath Ironworks, presents only the conclusions of their independent medical examiner, Dr. Herzog toward this end. Doctor Herzog concluded that the Claimant suffered from the same injury and

condition identified by the Claimant's treating physician. He specifically diagnosed the Claimant with DJD of both knees. (EX-14, p. 2). Herzog only disagreed with the Claimant's physicians on the question of whether or not this condition was caused by the Claimant's occupation. He stated in his medical report that it was not. (EX-14, p.3).

The Court considers Dr. Herzog's deposition testimony in addition to his medical records. Based on this testimony we are convinced that Herzog misunderstood the exact nature of Claimant's prior employment. Because of his misunderstanding, Herzog believed that the Claimant could return to work at his normal job and simply restrict his walking and lifting tasks to half of a day. The Court is well aware, as apparently was Dr. Herzog during his deposition, that this is not in fact the case. Confronted with the exact nature of the Claimant's position, Herzog testified that work of that type would put additional stress on a persons knees and thereby accelerate the degeneration of the joint. (Depo. of Herzog at 18).

Doctor Herzog also notably voiced the opinion that the Claimant could not presently work in a position with the attendant duties and stresses of the Claimant's previous work. He suggested that instead Claimant should seek positions which allowed him to sit for the better portion of the day. (Depo. Of Herzog at 11-14). This is clearly in contradiction with Dr. Herzog's assertion that the Claimant could return to his former employment on a restricted basis. Considering all of the testimony and evidence the Court concludes that Dr. Herzog would ultimately agree that the conditions of Claimant's work place were ultimately responsible for the accelerated degeneration of his knees. Thus the Court finds that the evidence in the record is not sufficient to overcome the Section 20(a) presumption. The Court further concludes that the Claimant's disability is compensable under the act.

III. Nature and Extent

A temporary disability may become permanent under the Act where the Claimant demonstrates either 1) that he suffers from residual disability after the point of maximum medical improvement; or, 2) that his condition has continued for a lengthy period and apparently is of lasting or indefinite duration. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Here the Claimant's burden of proof is met not only by his physicians, but by the Employer's independent medical examiner. Doctor Herzog testified in his deposition that the Claimant would eventually require replacement of both of his knees. Barring replacement, Herzog stated that the Claimant was now medically stable in the sense that his injury's lasting and indefinite duration was not likely to change substantially. (Depo. of Herzog at 15). This sentiment was echoed by both Dr. Kolkin and Dr. Miller, Claimant's treating physicians. Their records reflect the continuing and apparently indefinite nature of the Claimant's knee injuries. (CX-7, p. 9; CX-5). The medical records of all of the physicians who have seen the Claimant lead the Court to conclude that the Claimant's disability has now become permanent. There is no evidence to suggest that he will ever be able to return to his prior employment.

This of course leads to the question of whether or not the Claimant is totally disabled. Certainly Claimant has proven that he is unable to return to his former employment. It is now Employer's burden to demonstrate that despite this impairment there are realistically available job opportunities near the Claimant's residence that he is capable of performing considering all of the circumstances. *See Lucus v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). Employer provides the Court with the labor market survey prepared for it by Peter Duchesneau. The evidence shows that Mr. Duchesneau has a master's degree in public administration from the University of Maine at Orono. (Depo. of Duchesneau at 20). It also shows that Duchesneau has no educational background or research credentials in vocational rehabilitation. (Depo. of Duchesneau at 20-21). In fact, Duchesneau testified that his only qualification to perform this type of analysis was through on-the-job training and seminars over the past few years of his work experience. (Depo. of Duchesneau at 7-8). Given this evidence, the Court is not persuaded that Mr. Duchesneau possesses the requisite credentials to support his analysis of the Portland labor market. We think that Mr. Duchesneau's lack of background and expertise in this area are sufficient grounds on which to disregard the labor market survey.

Despite our concerns about Mr. Duchesneau's credentials, the Court has read his labor market analysis in this case. The Court is disturbed that this analysis is based entirely on the medical conclusions of Dr. Herzog in his second opinion report of February 19, 1999. (EX-12, p. 2). As we have explained before, these conclusions were based on Herzog's misunderstanding of the Claimant's prior employment. As such, the findings of that report are inherently flawed as admitted by Dr. Herzog in his deposition. These errors in the compilation of the labor market survey give the Court an alternative reason why we reject the findings of the survey and disregard it as a whole. Even if Mr. Duchesneau is otherwise qualified to perform such an analysis, his product in this case is tragically flawed and therefore of no use to the Court.

Since we have compelling reasons to disregard the Employer's labor market analysis, the Court is left with no evidence that there is suitable alternate employment for the Claimant. The Court therefore finds that the Employer has not met its burden and that the Claimant is permanently totally disabled from working as a result of his knee injuries. The Court further finds that the Claimant is entitled to compensation for permanent total disability.

ORDER

1. Claimant is entitled to temporary total disability benefits from January 7, 1999 until September 11, 2000 based on an average weekly wage of $948.13;

2. Claimant is entitled to compensation or reimbursement for all past and future reasonable and necessary medical expenses;

3. Employer shall pay to Claimant permanent total disability benefits based on an average weekly wage of $948.13 from September 11, 2000 until the present and continuing;

4. Employer is entitled to credit for all compensation paid until the present date;

5. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury Bills as of the date this Decision and Order is filed with the District Director;

6. Claimant's Counsel, James Case, shall have 20 days from the receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petitions in which to respond to the petitions.

So ORDERED.

RICHARD D. MILLS
Administrative Law Judge

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